APPEAL NO. 93164

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8301-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On January 25, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues in the case were: "a. did the claimant have disability after December 3, 1991; and, b. if so, what temporary income benefits are due the claimant." The hearing officer determined that the claimant's loss of employment was due to his own actions and not to his disability and therefore he is not entitled to temporary income benefits.

Appellant, claimant herein, contends the hearing officer erred in his findings of fact and conclusions of law and omitted or misstated certain facts in his statement of the evidence and therefore requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Although not clear from the evidence, claimant apparently sustained some type of compensable injury on (date of injury) while working as a labor or "utilityman" for (employer). This accident apparently involved claimant being knocked backward and sustaining a contusion, "a right frontal closed head injury" and a bruised or rotator cuff injury to the left shoulder. (The hearing officer recites claimant injured the rotator cuff on his right shoulder but the medical records indicate it was a left shoulder injury.) Claimant testified that his "shoulder aches" and he has "muscle spasms." Claimant testified, and is supported by the medical records and deposition testimony, that he has trouble with heavy/repetitive lifting, pushing, pulling and overhead lifting/pulling. After claimant's discharge by the employer on December 2 or 3, 1991 claimant worked for a time, probably in 1992, for another employer mowing grass, using a tractor and carrying bags of seed, at a reduced wage. The circumstances of claimant's leaving the second employer are disputed, with the carrier alleging claimant was again discharged for failing to show up at work and claimant alleging he was unable to work because of pain from the (date of injury) injury.

The great majority of the CCH dealt with the circumstances surrounding claimant's discharge, employers' attendance policy and whether claimant had been properly charged with recorded absences (RA). The treating, and basically only, doctor involved in this case is (Dr. T). Dr. T diagnosed a rotator cuff injury and followed claimant fairly regularly from his initial visit of April 10, 1991 until the December incident which led to claimant's discharge by the employer. Dr. T's progress note of 12-2-91 indicated that claimant continued to have subjective complaints of pain in his shoulder, as well as cervical pain. Dr. T in the progress note stated that taking claimant off work "might precipitate other problems . . . with his employer . . . ." Dr. T then notes ". . . we probably ought to go ahead and give him some time for pure rest." The hearing officer apparently gave great weight to a letter dated

January 3, 1992 to claimant's previous attorney. In that letter, Dr. T recounts that claimant "demanded he have three weeks off over the Christmas holidays . . . .," refused to see another doctor to whom Dr. T had referred him, and that Dr. T had told the employer that light duty work would be acceptable.

The hearing officer found in pertinent part:

FINDINGS OF FACT

5.The Claimant began working at light duty under his treating doctor's orders on (date of injury), and he continued to do so through December 2, 1991.

6.The Employer provided light duty work for the Claimant in accordance with the treating doctor's requirements.

7.On December 2, 1991, the Claimant obtained a work release slip for three weeks from his treating doctor under threat of reprisals.

8.The Claimant did not provide the Employer with a copy of the work release slip.

9.The Claimant did not return to work with the Employer or explain his absence to the Employer.

10.The Employer terminated the Claimant's employment effective December 3, 1991.

CONCLUSIONS OF LAW

2.The Claimant's loss of employment was due to his actions in threatening his doctor, obtaining an improper work release form, and in not returning to work, not to his disability.

3.The Claimant did not have disability after December 3, 1991.

Claimant's initial complaint is that the hearing officer's Statement of Case and Statement of Evidence contained instances where the hearing officer "misstates the employee's position," omitted certain evidence, omitted reciting claimant's version of a matter, and correcting the hearing officer's definition of disability. Claimant also disagreed with various portions of the Statement of Evidence and asserted a statement in the Statement of Evidence "is not supported by the substantial evidence." Claimant requests the Appeals Panel "correct the Statement of the Case." Claimant also alleged error in the hearing officer's Findings of Fact Nos. 8, 9, and 10, and Conclusions of Law Nos. 2 and 3,

quoted above, as well as the Decision and Order.

With reference to the claimant's allegations of errors and omissions in the discussion and Statement of Evidence portions of the decision, we note that Article 8308-6.34(g) required the hearing officer to issue a written decision which includes findings of fact and conclusions of law, a determination of whether benefits are due, and an award of benefits due. The hearing officer' Decision and Order in this case contained those elements. *See* Texas Workers' Compensation Commission Appeal No. 92533, decided November 30, 1992, and Texas Workers' Compensation Commission Appeal No. 92140, decided May 20, 1992. The fact that the hearing officer did not recite all the evidence presented, or did not discuss the evidence from the claimant's point of view, or adopt claimant's theory, does not constitute error. We find that the hearing officer's short hand paraphrasing of the exact terminology of the statutory definition of disability in the statement of evidence not to be error in that the paraphrasing was not used in the contested findings of fact or conclusions of law, and even if this were somehow error, which we do not determine, it was harmless and as such would not affect the outcome. *See* Texas Workers' Compensation Commission Appeal No. 92178, decided June 17, 1992. Regarding the allegations that certain statements in the Statement of Evidence are "not supported by the substantial evidence," we will review the findings of fact and conclusions of law which constitute the hearing officer's decision on a sufficient evidence, standard as discussed below, rather than attempt to analyze and discuss each sentence in the hearing officer discussion.

As evidenced in the hearing officer's Finding of Fact No. 7 and Conclusion of Law No. 2, as well as the Statement of Evidence, the hearing officer apparently placed great weight on Dr. T's letter report dated January 3, 1992 to claimant's previous attorney wherein Dr. T stated claimant "demanded that he have three weeks off . . . ." and that claimant " . . . was adamant in his position about not returning to work at all." Although not stated in the January 3rd letter, (Mr. S), the employer's representative and claimant's supervisor, testified that he had talked with Dr. T after getting the December work release slip, and that Dr. T had expressed concern that if he had not given claimant the three week work release slip, Dr. T would have been subject to "reprisals" by claimant. Dr. T's January 3, 1992 letter is quoted at great length, with certain portions emphasized, by the hearing officer.

Claimant contends Findings of Fact Nos. 8 and 9 quoted previously are erroneous and "not supported by substantial evidence." We would point out that Finding of Fact No. 8, as stated above, may be technically correct but subject to some explanation. Claimant did not provide the employer with a copy of the work release slip, presumably because he lost it. However, the employer obviously knew of the work release slip because both Mr. S and Dr. T indicated they spoke after claimant was given the slip. Dr. T in his January 3, 1992 letter states claimant's ". . . boss from [employer] called and stated that the patient had marched in and demanded three weeks off and presented my note." Mr. S testified he knew about the work release and spoke with Dr. T. It was Mr. S's position that Dr. T had,

in effect, revoked the work release slip, by saying it had been obtained by threat of "reprisals" and that claimant could perform available light duty. Consequently the hearing officer's Finding of Fact No. 8 would be that claimant did not provide the employer with a valid work release slip. Claimant does not argue that employer had the work release slip only that "the employer was aware of the work release for the period December 2, 1991 to December 23, 1991 and that Claimant informed Employer of the same December 2, 1991 after he was seen by [Dr. T] on that day." Claimant here is apparently agreeing that he called or otherwise spoke in person with Mr. S, while in point 3 of the appeal claimant states that he "denied having a telephone conversation with [Mr. S] after December 2, 1991 concerning his return to work on December 3, 1991." As may be evident in this recitation, what was said to whom, through what medium, on what date, is hotly disputed.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). The hearing officer was obviously concerned, and believed that claimant's December 2nd work release slip was obtained "under threat of reprisals" and by "threatening his doctor." The hearing officer saw and heard the testimony and observed the demeanor of the witnesses, including that of the claimant. From our review of the record we do not find any basis to disturb the assessment of the hearing officer on this point.

Claimant also argues that the hearing officer's Conclusion of Law No.2 is erroneous in that claimant's loss of employment was due to employer's "intentional misapplication" of its attendance policy to claimant. Mr. S explained employer's attendance policy to be that if an employee accrues nine recorded absences (RA) in 12 consecutive months that was grounds for termination. It was employer's interpretation that if an employee has a documented medical appointment no infraction, RA, would be assessed if the employee either worked part of that day or the doctor's statement said the employee was unable to work. Mr. S explained merely going to a one or two hour doctor's appointment does not justify absence from work for eight hours, particularly where there were flexible work hours available. The hearing officer, after hearing claimant's interpretation of the attendance policy and employers interpretation, chose to believe the employer's version. Which version was applicable, was a factual matter within the province of the hearing officer to decide, as the sole judge of the weight and credibility of the evidence.

Claimant also contends that Conclusion of Law No. 3 is erroneous. The hearing officer found claimant did not have disability after December 3, 1991. Article 8308-1.03(16) defines disability as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. In reading the findings of fact and conclusions of law together, it is clear that the hearing officer believed that claimant

threatened Dr. T into giving him a three week work release because claimant did not want to return to work and thereafter did not return to work of his own volition. Testimony from Mr. S was that light duty was available for claimant within claimant's capabilities, that Dr. T agreed that claimant was capable of performing those duties but that claimant failed to return to work. The hearing officer's conclusion that claimant did not have disability after December 3, 1991 is bolstered by claimant's testimony that he had been employed for a period of time by another employer. As previously noted, the circumstance of claimant's leaving the subsequent employer is in dispute and is not at issue in this case. Claimant clearly had the ability to retain employment at his regular wages with the employer until his termination for cause. That the trier of fact might have arrived at findings different than he did does not justify the abrogation of the determination the trier of fact concluded from the evidence to be the most reasonable. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758, 760 (Tex. Civ. App.-Amarillo 1973, no writ).

Where, as here, there is sufficient evidence to support the hearing officer's determinations, there is no sound basis to disturb his decision. Only if we were to determine, which we do not in this case,that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we be warranted in setting aside his decision. In re Kings Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 715 S.W.2d 692 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92232, decided July 21, 1992.

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, with the modification as noted above, the decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge